

# **Conservancy District**

## **An Option for the Management of Georgetown Lake Dam**

### **February 3, 2004**

#### **Summary**

The purpose of this summary and the paper that follows is to provide information about conservancy districts and how such a district might be applied to operation and management of the Georgetown Lake Dam (Dam). To be clear, the Dam is owned by Granite County, and decisions regarding it is the sole prerogative of the County. In preparing this paper, the Upper Clark Fork River Basin Steering Committee (Steering Committee) is not recommending adoption of a conservancy district. Any decision to do so would be Granite County's as the Dam's owner together with the people who benefit from the Dam's operation. The Steering Committee seeks only to focus attention on this alternative because it appears to offer advantages including improvement of the Dam's long-term operation, assumption of Granite County's funding liability for the Dam, and protection of the Dam's water right. These advantages would have to be weighed against the challenges of forming such a district which are set out in Montana law.

In recent years, the operation of Georgetown Lake Dam (Dam) has generated considerable controversy including a lawsuit in federal court. The responsibility for funding the operation, maintenance, and, if necessary, rehabilitation the Dam lies solely on its current owner, Granite County. The existing water right associated with the Dam is based on generating electricity. This use was discontinued in 1989, and Granite County surrendered the federal license for operating the dam in 1998. The Department of Natural Resources and Conservation (DNRC) has indicated to Granite County that the water right must be changed to accommodate the discontinuance of hydropower generation. While the County did file a change of use application with the DNRC, it withdrew the application after DNRC deemed it incomplete. Given the absence of a change application, the risk that the water right may at some future date be deemed abandoned is growing.

The Steering Committee is charged by state law with writing and implementing a water management plan for the upper Clark Fork River Basin. In the fall of 2000, the Steering Committee helped local people establish a Georgetown Lake Watershed Committee in response to the controversy and law suit filed resulting from operation of the Dam. The watershed committee met through the spring of 2001 until its function was superceded by the Flint Creek Dam Advisory Committee which the Granite County Commission convened pursuant to an agreement settling the federal lawsuit.

The Steering Committee has identified an alternative structure for public ownership of the Dam that might address the existing concerns surrounding it. The alternative, a conservancy district, is a subdivision of state government formed by public vote, designed by its members, and governed by an elected board. A conservancy district is not a conservation district which is a different entity. Under Montana law, a conservancy district can be designed to manage and balance the benefits provided by a development such as the Dam and provide the ability to cover the Dam's costs through multiple revenue streams generated from a broad base of its beneficiaries, not just irrigators.

The paper that follows attempts to summarize the existing situation regarding the Dam, the potential advantages of a conservancy district, and the process that must be followed to create it. The Steering Committee would be pleased to host discussions of the application of a conservancy

district to Georgetown Lake if sufficient interest exists to do so. Also attached to this summary is a list of Steering Committee members together with information necessary to contact them.

## Introduction

Creation of a conservancy district may provide an alternative structure for the public ownership and management of Georgetown Lake Dam. A conservancy district<sup>1</sup> is a subdivision of state government, formed by public vote, designed by affected district members, and governed by an elected board. It is uniquely designed to: a) manage the multiple benefits provided by a development such as the Georgetown Lake Dam; b) provide a greater ability to pay development costs through multiple revenue streams; c) and act as a dedicated local public institution for facility management. It could be authorized to balance water and reservoir management to actively balance the Lake's potentially conflicting uses.

Owning, managing and maintaining water storage facilities, such as the Georgetown Lake Dam, presents many challenges requiring unique skills and personnel. At times, it also requires significant expense. In recent years, acrimonious conflict and competition between beneficiaries of Georgetown Lake water – all of them “nonpaying beneficiaries” – have placed considerable added responsibilities on the Granite County Commission and its staff. While the County has been working toward improved management of the Georgetown Lake Dam using snow and runoff forecasts and modeling tools developed by the former facility owner the Montana Power Company, an agreed upon operational plan with annual goals and objectives is still lacking. Also, lacking is a water right for the dam's current operation. The historic and principal purpose for the construction of Georgetown Lake Dam was the generation of electrical power. Power generation remains the only legally protected water use at the dam.

Specific facts regarding the current situation regarding the Georgetown Lake Dam include the following.

- ☞ The hydropower facility at the Georgetown Lake Dam is inoperable and has been since 1989.
- ☞ The facility no longer generates a revenue stream to support project operation and maintenance, much less its rehabilitation.
- ☞ Taxpayers of Granite County now bear the sole burden of Georgetown Lake Dam expenses. In transferring ownership of the dam to Granite County, MPC provided a million dollars for the rehabilitation of the project. More than \$100 thousand of these funds have been spent on legal fees, and some \$737,000 remain.
- ☞ The beneficiaries of the Georgetown Lake Dam include downstream consumptive water users, downstream instream flow users (stockwater and fish), in lake fishery interests, lake shore home owners and recreation service industries. None of these beneficiaries pay directly for benefits received. Some are Granite County residents who pay property taxes, but not all.
- ☞ All of the beneficiaries have an interest in and many have challenged current management through requests for alternative management, recommendations from advisory committees, and court challenges.
- ☞ The County has had to participate in legal actions to defend their asset during conflicts between nonpaying beneficiaries.
- ☞ Because of fourteen years of nonuse and what appears to be continuing nonuse, the risk that the Georgetown Lake Dam water right will be deemed abandonment is increasing.
- ☞ While Montana water law does provide mechanisms and a review process to “change the purpose and place of use” of a water right, the current ownership/management structure does

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<sup>1</sup> A Conservancy district should not be confused with “Soil and Water Conservation Districts”, such as Granite County Conservation District, of which Montana has fifty-eight.

not provide a clear mechanism to define these features in an administrative review proceeding.

The cost of maintaining and managing public infrastructure is always a challenge. Repair of water storage facilities is often very expensive and difficult to fund. Frequently, a single use cannot economically finance the costs of new construction or bear the total costs of rehabilitation. The current support from the Federal Government that has historically underwritten such facilities has greatly diminished since the 1970s. The State of Montana has developed specific grant programs for public water use infrastructure and a specific earmarked water storage account. However, these funds remain limited and small in comparison to expenses and considerable competition exists for use of those funds. State-owned water storage and water development projects, such as the East Fork Reservoir that serves Flint Creek, are frequent users and competitors for these funds. Therefore, the lion's share of these costs will still lie with the dam owner and the water user. The continued viability of water projects may, therefore, depend on finding a way for all project beneficiaries to participate in project funding. It is important to note that any beneficiary asked to pay will also likely demand a voice in project management.

### **Purpose and Authorities of a Conservancy District**

In 1969, Montana's legislature developed a multipurpose district known as a conservancy district. This district was specifically created to capture revenues from a broader base of water users for the benefits of such multipurpose projects. Such districts are empowered to:

- ☞ Prevent and control floods, erosion and sedimentation
- ☞ ***Regulate stream flows and lake levels,***
- ☞ Improved drainage,
- ☞ ***Promote recreation,***
- ☞ ***Develop and conserve water resources,***
- ☞ ***Provide for the conservation and development and utilization of land and water for beneficial uses,*** (emphasis added).<sup>2</sup>

Statutory authorities granted a conservancy district might provide several advantages and benefits not available under the current management structure of Georgetown Lake Dam. These include, but are not limited to, the ability to:

- ☞ Balance management objectives among all project beneficiaries including: hydropower, recreation, wildlife, fishery, stream and lake regulation and water supply;<sup>3</sup>
- ☞ Create a "multi-county" district boundary that could include most, if not all, facility beneficiaries: irrigators, homeowners, recreation facilities, service industry, future hydropower, in-lake values and instream water used downstream;<sup>4</sup>
- ☞ Govern a locally developed public entity via a locally elected board;
- ☞ Design a governance and operational plan to meet the unique characteristics and purposes of the district;
- ☞ Borrow money, mortgage district property, issue bonds and contract with Federal and state agencies;
- ☞ Accept grants, loans and other assistance;
- ☞ Collect assessments for operation from within the district boundaries; and

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<sup>2</sup> 85-9-102 MCA 2003

<sup>3</sup> 85-9-101 MCA 2003

<sup>4</sup> 85-9-102 MCA 2003

☞ Collect fees for service, facilities, or water contracted by the district. □

## **Georgetown Lake Dam Water Right**

**Hydropower** - As noted above, Georgetown Lake Dam was constructed to develop power, but the hydroelectric generation units have not operated since November 12, 1989. The existing water right for Georgetown Lake Dam is limited hydropower production. Also, Granite County surrendered the Federal Energy Regulatory Commission (FERC) license to operate the Dam to generate electricity in February 1998<sup>□</sup>. It is important to note that the County has applied to FERC for a new license and is exploring the options to rehabilitate and reactivate the hydropower facility. However, today's volatile energy market and unique site limitations are making this task difficult. A key hurdle is an annual \$75,000 special use fee that must be paid to the United States Forest Service because the Dam and reservoir lie on USFS land. □ Even if Granite County were able to restore hydro operations, doing so would develop a limited revenue stream from only one of the facility's several beneficiaries. A conservancy district may enhance the feasibility of such a development by diversifying its revenues. It might also ensure that the water use is balanced between the needs of hydropower production and those of other project beneficiaries, a requirement of past FERC licenses. □

**Abandonment** - Water Rights in Montana can be abandoned through non-use. Montana law provides administrative proceedings to declare a water right abandoned. Such proceeding can be initiated after ten years of nonuse. It also provides, however, that abandonment proceedings are stayed while the statewide general stream adjudication is ongoing. During adjudication proceedings the Montana water Court can also consider whether a water right has been abandoned by examining use up and until the actual hearing.

While the Georgetown Lake Dam hydropower facility was in full operation until 1989, abandonment still could be raised as part of the adjudication or in other legal forums. The county's application to FERC for a new hydropower licenses is evidence of lack of intent to abandon however. As time passes and if current facility management conditions remain unchanged, the strength of an abandonment argument will grow. Current management of Georgetown Lake Dam is not supported by a water right and may be in violation of the Montana Water Use Act.

**Protecting New Uses** - In 2000, Granite County submitted to the DNRC an "Application to Change Appropriation Water Right" to convert the purpose of water use at Georgetown Lake Dam from hydropower storage to irrigation storage. In reviewing the application, DNRC staff found numerous deficiencies, the most significant of which was the failure to provide for the needs of downstream water right holders and to identify a place of use and the beneficiaries for an irrigation water right. The County opted not to correct the deficiencies and allowed the application to terminate.

**Defining Multiple Benefits** - Many interests benefit from the Georgetown Lake Dam and the lake it creates. With its 2,850 surface acres, Georgetown Lake has become a high value summer home area as well as a recreational destination site. Activities supported include camping, swimming, water skiing, and others. The recreation service industry in the vicinity of the lake is

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□ 85-9-401 –423 MCA 2003

□ "Order Accepting Surrender of License" Project No 1473-013, United States Federal Energy Commission, 82 FERC 02,079, February 9 1998.

<sup>7</sup>Granite County is seeking Congressional authorization to reduce this fee from \$75,000 to \$25,000.

□ "Order Issuing Major License", 62,133, Article 402, FERC, May 8, 1992.

growing supported by both the lake, the ski area, and other recreational opportunities on nearby private and public lands. Georgetown Lake is well known for supporting a year-long, high value fishery. The lake storage capacity is 31,040 acre-feet of water.<sup>□</sup> Mitigation requirements under the FERC hydropower license tended to limit the actively managed reservoir pool to the top two feet. Assuming a single fill, these two feet represent an active storage of 5,850 acre-feet of water, an amount that could produce a flow of 30 cfs over a 98-day period above natural stream flow in the Flint Creek drainage.<sup>□</sup> Historically, the stored water was used for only for power generation but indirectly augmented late season flows to senior and junior water users. In the last several years, the County has increased lake discharges in the summer by pulling from storage to augment the 30 cfs natural stream flow in Flint Creek. None of the users of Georgetown Lake or of the released water provide any financial support for the project.

When considering benefits from the Georgetown Lake Dam, it is important to note that the 1906 federal water rights decree set conditions on the operation of the dam, including the release of 30 cfs to downstream senior irrigators to mitigate the impacts of storage on the downstream senior users.<sup>□</sup> Under Montana water law, the 30 cfs release to mimic natural flows without the dam became part of the stream and was subject to appropriation by priority. The 30 cfs condition in the 1906 decree is, therefore, likely to be continued and probably could not be subject to assessments to provide funding to maintain and operate the dam.

### **A District for Georgetown**

Creation of a Conservancy district could, in part, address the water right and revenue and issues facing Granite County as the owner of Georgetown Lake Dam. First, defining the district boundaries would create a place of use and identify the dam's beneficiaries and benefits, thereby facilitating a change in the existing hydropower water right. Since a district boundary can cross county lines, all of those users downstream that benefit from the storage and release of water as well as property owners around the lake could be candidates for inclusion in a district. Second, a District may facilitate obtaining revenue from all project beneficiaries. As previously mentioned, at least 5,800 acre-feet were released historically from storage during the water year. The downstream water users that would continue to benefit from the release of stored water could be assessed a fee commensurate with their benefits to help pay the dam expenses. Owners of lakeshore and near-shore lands have interest in the amount and timing of water held in the reservoir for recreation and homeowner benefits. Including areas around the lake and the lake itself in the District would increase the lands open to assessment. Those so interested might also contract with the District to pay to maintain minimum pool levels. Other entities, notably fishery and recreational interests, who do not own properties in the district may also be amenable to contracting and paying for "in-lake water levels" to meet recreation and fishery benefits. For example, these interests might pay to maintain water from the bottom of the lake to the elevation 6427.5 which was dead pool when operated at a hydropower facility. The ability to contract stored water for recreation and fishery benefits is not restricted under Montana law as are leases for instream flow. Painted Rocks Reservoir and Lake Como in the Bitterroot both have substantial contracts with the Montana Department of Fish, Wildlife and Parks that provide water

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<sup>□</sup> Project works description take from "Order Issuing Major License, 62,133", FERC, May 8, 1992.

<sup>□</sup> "Georgetown Lake Model, Reservoir Storage Table", Lance A Eliason MPC, modified Dave Amman, modified April 2002.

<sup>□</sup> Montana Water, Electric Power and Mining Company v Mary Shuh et. al., Case 655, Circuit Court of the United States, Ninth Circuit, District of Montana, Judge William Hunt, March 31, 1906.

for fish. Although pursuant to state law, the District could not act as a power company and generate, distribute and sell electrical energy, it probably could contract with a utility that would provide these services.

Of course, those interests which now receive benefits from the Georgetown Lake Dam for free may be reluctant to begin paying for them. However, someone must pay to operate, maintain and rehabilitate the project, and Granite County property tax payers may be unable or unwilling to continue to do so. Faced with this prospect, current beneficiaries may be willing to pay for the dam through a Georgetown Lake Conservancy District that owns and maintains the dam, especially if they are able to how doing so would both them and the larger community and if they can participate meaningfully in District governance.

## **District Formation**

The process of establishing a district including developing its structure, duties and land base is complex and has its difficulties. A brief outline of the process is as follows.

1. First the DNRC, on its own behest or in response to a petition from 10% of “potential district” residents, is required to do a “feasibility study.”
2. Next the DNRC holds a hearing on the concept and the feasibility study. After the hearing a more detailed feasibility analysis may be required.
3. A petition signed by owners of at least 51% of the effected rural lands and the lesser of 51% or 100 of the electors within an effected municipality is then submitted to the district court.
4. The court then holds a hearing on the petition.
5. If, based upon the petitions and testimony of the hearing, it grants the petition, the court then:
  - a. Determines which lands are benefitted and includes them within the district;
  - b. Fixes the time and place for an election; and
  - c. Decrees the district be organized pending a vote by 51% of the eligible electors with a majority voting in favor of the petition.
6. The election is then conducted and formation of the district approved or disapproved by the district voters.

## **Conclusion**

With Granite County's acceptance of ownership of the Georgetown Lake Dam, the county and its county residents assumed the responsibility for operating, maintaining, and when necessary rehabilitating the dam. Because of the shut down of the hydroelectric generation, no revenue stream exists to pay these costs. Also, the water right for this facility is tied to power generation, and unless and until a change in this right is successful, the risk that the right will be deemed abandoned is growing.

While rehabilitating the hydropower generation may resolve these issues, creating a Georgetown Lake Conservancy District and transferring ownership of the Dam to it may offer an alternative with advantages. While they are cumbersome to establish, conservancy districts are uniquely designed to provide for multiple benefit projects. Through assessments and water contracts, a Georgetown Lake Conservancy District could recoup the Dam costs and share them with larger pool of beneficiaries than Granite County property tax payers. <sup>□</sup> The district would also have powers to accept grants, loans, participate in state and federal programs, and sell bonds and incur indebtedness. A Georgetown Lake Conservancy District could also ensure local control of the dam, balance the benefits it provides, and protect the water right necessary to preserve its

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<sup>□</sup> Water contracts would be limited to stored water and would be subject to the constraints of the 1906 Federal Decree.

operation.